85-1777

NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

NAOMI FARLEY, Petitioner

v

ITT LIFE INSURANCE CORPORATION

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL R. HODGSON
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63 pp

QUESTIONS PRESENTED

1. Whether an insurance policy (decreasing term) issued by the insurer on September 21, 1977, in the original amount of $45,220. on the life of Defendant's husband to cover a note (signed by Defendant and her husband) repayable in 10 years in the total amount of $45,220. (when the insurer's agent told Defendant at the time of signing the note: "Don't worry Naomi. There's insurance on it.") may be reformed after the death of Defendant's husband on October 1, 1980, to show the original amount of insurance to be $10,000. on the basis of mutual mistake in the face of the incontestability provision of the policy and the Oklahoma Statute.

2. Whether laches has barred the reformation when a copy of the Certificate of Insurance was in the possession of the insurer's agent during

the 3 year period and the Defendant cannot now secure insurance on her deceased husband to cover the balance of the loan.

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NO. _____

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NAOMI FARLEY, PETITIONER

V

ITT LIFE INSURANCE CORPORATION

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of The United States Court of Appeals For the Tenth Circuit entered in the this matter on February 18, 1986.

OPINIONS BELOW

The February 18, 1986, opinion of the Court of Appeals, whose judgment is herein sought to be review, is reported at 783 F.2d 978, and is reprinted in the Appendix to this Petition, pp. 30-45. The Court of Appeals' Order denying Defendant's Motion to certify the question of state law on incontestability to the Supreme Court of the State of Oklahoma, is reprinted in the Appendix, pp. 46-47. The prior opinion of the United States District Court for the Northern District of Oklahoma is also reprinted in the Appendix, pp. 48-59.

JURISDICTION

The judgment of the Court of Appeals was entered February 18, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an insurance policy (decreasing term) issued by the insurer on September 21, 1977, in the original amount of $45,220. on the life of Defendant's husband to cover a note (signed by Defendant and her husband) repayable in 10 years in the total amount of $45,220. (when the insurer's agent told Defendant at the time of signing the note: "Don't worry Naomi. There's insurance on it.") may be reformed after the death of Defendant's husband on October 1, 1980, to show the original amount of insurance to be $10,000. on the basis of mutual mistake in the face of the incontestability provision of the policy and the Oklahoma Statute.

2. Whether laches has barred the reformation when a copy of the Certificate of Insurance was in the possession of the insurer's agent during

the 3 year period and the Defendant cannot now secure insurance on her deceased husband to cover the balance of the loan.

STATUTES INVOLVED

Title 36 Okla. Stat., 1971, §4004:

> There shall be a provision that the policy (exclusive of provisions relating to disability benefits or to additional benefits in the event of death by accident or accidental means) shall be incontestable, except for nonpayment of premiums, after it has been in force during the lifetime of the insured for a period of two years from its date of issue.

Title 36 Okla. Stat., 1971, §4015:

> "A clause in any policy of life insurance providing that such policy shall be incontestable after a specified period shall preclude only a contest of the validity of the policy, and shall not preclude the assertion at any time of defenses based upon provisions in the policy which exclude or restrict coverage, whether or not such restrictions or exclusions are excepted in such

clause; nor shall it be construed to preclude adjustment at any time of the amount payable or benefits accruing under the policy for misstatement of age, whether or not such age adjustment provision is excepted in such clause."

STATEMENT OF THE CASE

This was an action for reformation of a Certificate of Insurance issued to Defendant's husband to correct the stated amount of original insurance from $45,220.00 to $10,000.00, on the basis of mutual mistake. (First ¶ of Trial Court's Findings of Fact and Conclusions of Law [TCFFCL]) Defendant claimed there was no mutual mistake and the policy could not be reformed under the incontestability clause and/or because of laches. (Second ¶ of TCFFCL)

The facts:

1. September 21, 1977, Defendant

and her husband obtained a loan from Aetna Finance Company for $21,025.75 payable over 10 years in the total amount repayable of $45,220.00. (TCFFCL ¶4)

2. Defendant's husband applied for, on certain forms, $10,000.00 of decreasing term insurance (the maximum amount that Aetna Finance Company was allowed to write, and the proper premium for the policy for $10,000.00 was $842.91. (TCFFCL ¶5)

3. Defendant came to Aetna's office to sign loan documents on September 21, 1977. Aetna's agent told Defendant where to sign. She signed without reading the documents (including a Federal Disclosure Statement signed by Defendant and her husband showing $10,000.00 insurance coverage -- TCFFCL ¶6). Aetna's agent told Defendant, "Don't worry Naomi. There's insurance on it." (TCFFCL ¶8)

4. Defendant's husband died

October 1, 1980, (TCFFCL ¶7) and the insurer paid $6,974.92 to Aetna as proceeds of the insurance contract, which was credited to Defendant's and her husband's loan. $6,974.92 was the correct amount for a $10,000.00 policy (TCFFCL ¶10), but it left a balance due on the loan of $13,334.67, and as of the trial date the balance was $19,972.12. (TCFFCL ¶11)

5. Plaintiff admitted that Aetna had the original or a copy of the Certificate of Insurance in its files from September 21, 1977, to the date of the lawsuit (after date of death); that neither Plaintiff nor Aetna notified Defendant or her husband that the Certificate was incorrect, nor did they contest the amount of the Certificate prior to October 1, 1980 (date of death) (Request for Admissions and Responses #21, 22 and 24 of Record on Appeal,

Volume 1 beginning on pages 33 and 52).

6. The Trial Court found as facts that:

(a) It was a clerical error not discovered by either party until after October 1, 1980 (TCFFCL ¶7);

(b) The agent's statement to Defendant did not amount to a representation that the full amount of the loan was covered by insurance (TCFFCL ¶8);

(c) The intent of the parties was for $10,000.00 original amount (TCFFCL ¶9); and

(d) There was no reliance by Defendant and her husband on the Certificate showing $45,220.00. (TCFFCL ¶12)

7. The Court of Appeals followed the foregoing facts and added (fourth paragraph of the opinion) that the agent

who initiated the policy on behalf of Aetna and the insurer did not recall the events of September 21, 1977.

8. The Trial Court reformed the Certificate of Insurance to show $10,000.00. (Judgment of Trial Court)

9. The Court of Appeals recognized that the death of Defendant's husband seriously hindered her ability to make the loan payments and to obtain additional credit life insurance. (Eighth paragraph of opinion)

10. The Court of Appeals recognized that it must apply Oklahoma law (Ninth paragraph of opinion), and there are no Oklahoma cases interpreting the incontestability provisions in these circumstances. (Twelfth paragraph of opinion)

The Rulings below:

The Trial Court reformed the

Certificate of Insurance, denying Defendant's defenses of "incontestability" and "laches".

The Court of Appeals affirmed.

The Court of Appeals denied Defendant's Motion to Certify the question of state law to the Supreme Court of Oklahoma on incontestability.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS BETWEEN THE NINTH AND TENTH CIRCUITS ON REFORMATION AND INCONTESTABILITY

The Tenth Circuit Court of Appeals, in this case, followed its earlier decision in Columbian Nat. Life Ins. Co. v. Black, 35 F.2d 571 (1929). The Tenth and Ninth Circuit Courts of Appeals reached opposite results with respect to reformation of insurance policies and incontestability. In Columbian Nat. Life

Ins. Co. v. Black, supra, a case from Colorado, the Court said:

> "We have found no authority upon the point, although there are many decided cases involving the construction and scope of the clause."

The Court then said:

> "***(W)e hold that an action to correct a purely clerical error in a policy issued, so that it will speak the truth as to the agreement of the parties, is not barred by the incontestable clause."

In Richardson v. Travelers Ins. Co., 171 F.2d 699 (CCA-9, 1948), a case from California, the Court said concerning the Black decision:

> "The reasoning of the court in the Black case makes one of two assumptions. *** However, we are not persuaded that these assumptions are supported by reason or law."

The Court also said:

> "It seems logical to assume that an action to reform portions of a document involves contesting their validity.***
>
> Logically the coverage of this

> clause should extend to those defenses which could be conceivably raised within the contractual period of contestability.***These inception defenses would include misrepresentation, fraud, breach of condition or warranty, mistake and lack of insurable interest.***
>
> ***As above pointed out, fraud, like mistake, is an inception defense, and falls naturally into the category of objections that should be raised within the one year period of the clause***." (Emphasis ours)

An Arkansas Court adopted the Richardson rule in Wheeler v. American Public Life Insurance Company, 344 F.Supp. 950 (U.S.D.C., E.D. Ark., 1972).

In 2 Okl. L.Rev. 371 (1949), the author analyzed the Black and Richardson cases and some of the Oklahoma cases. It concluded on page 375:

> "However, many of the arguments to including fraud within the scope of the incontestable clause [Oklahoma does -- Hulme v. Springfield Life Ins. Co., Okl. 565 P.2d 666 (1977); Bankers Security Life Insurance Company v. Killingsworth, Okl.,

> 284 P.2d 734 (1955)], to which analogy was drawn in the principal [Richardson] case, would seem to apply with equal vigor to a clerical error. the question remains a close one, but the principal case seems to have made the reasoning of the Black case less secure." (Inserts ours)

The Court in this case (Thirteenth paragraph of the opinion) disagreed with the Richardson conclusion because of "mutual mistake" (although there was no mutual mistake when the agent said "Don't worry Naomi. There's insurance on it" -- not "on part of it").

In Wheeler v. American Public Life Insurance Company, 344 F.Supp. 950 (U.S.D.C., E.D. Ark., 1972), the Court said at page 953:

> "Incontestability has nothing whatsoever to do with the agreement between the parties to the insurance contract. Although courts have differed on the construction and application they are unanimous in the above rule as a matter of law."

The Court denied the Motion to certify the question to the Oklahoma Supreme Court, while recognizing that its decision would be controlling.

Numerous Oklahoma cases shed light on the question, but none are precisely on point. They are:

(1) The incontestable clause applied even in cases of fraud by the insured, Hulme v. Springfield Life Ins. Co., Okl., 565 P.2d 666 (1977), Bankers Security Life Insurance Company v. Killingsworth, Okl., 284 P.2d 734 (1955). If the incontestable clause bars fraud, it bars mistake.

(2) Under the incontestable clause, the insurer reserves the right to ascertain all matter and facts material to its risk within the 2 years and not afterward, Hulme v. Springfield Life Ins. Co., supra,

Metropolitan Life Ins. Co. v. Peeler, 176 P. 939 (Okl., 1918). The difference between $45,220.00 and $10,000.00 of risk is material.

(3) In the incontestable clause, the word "contest" was defined as "an earnest struggle for superiority, or a defense" (emphasis ours), Lincoln Health & Accident Ins. Co. v. Jones, 52 P.2d 793 (Okl., 1935). Following the definition, on page 797, the Court said:

> "This being true, we may not, without invading the province of the Legislature, say that every contest, except those specifically stated in the incontestable clause of our statute, means only contests of a certain quality or going to a certain extent." (Emphasis ours)

Plaintiff is "struggling for superiority" in this case. It has asserted reformation as a "defense"

to Defendant's claim for the balance of the insurance. It is a "contest" of the amount of insurance coverage.

(4) Under the incontestable clause all defenses are barred, Lincoln Health & Accident Ins. Co. v. Jones, supra, Prudential Ins. Co. of America v. Mosley, 66 P.2d 35 (Okl., 1937). Plaintiff has asserted the "defense" of reformation to Defendant's claim.

(5) The incontestable clause renders the policy incontestable after the time on any ground except non-payment of premiums, Prudential Ins. Co. of America v. Mosley, supra. The Court said on page 37:

> "It seems to us that the language of the incontestable clause itself is very clear and explicit, and that if the policy was kept in force for one [now 2] year, thereafter the only ground on which payment may be contested is for the nonpayment of premiums."

Plaintiff has contested the amount of insurance coverage.

(6) Under the incontestable clause, if the premiums are paid, the liability shall be absolute under the policy, Metropolitan Life Ins. Co. v. Peeler, supra. This case was quoted in Hulme v. Springfield Life Ins. Co., supra, on page 668 as follows:

> "***'The meaning of the provision is that, if the premiums are paid, the liability shall be absolute under the policy, and that no question shall be made of its original validity. The language admits of no reasonable construction other than that the company reserves to itself the right to ascertain all the matter and facts material to its risk and the validity of its contract for one (present case, two) year; and that if within that time it does not ascertain all the facts, and does not cancel and rescind the contract, it may not do so afterwards upon any ground then in existence.' (citing cases.)'

(Explanation and emphasis added.)"

The liability for the coverage stated in the Certificate was absolute. It could not be reduced on any grounds (including reformation). The Court used the conjunction "and" between "all the matter and facts material to its risk" "and" "the validity of its contract". Therefore, Plaintiff had the 2 years to make its determination with respect to the amount of its risk "and" with respect to the validity of the contract.

(7) Under the incontestable clause there can be no defense of any kind interposed against the collection of the full amount specified in the policy, and insurer cannot lull insured into a feeling of security and endeavor to avoid its contract

when death has forever sealed the lips of the insured, Reliance Life Ins. Co. v. Thayer, 203 P. 190 (Okl., 1921). The Court quoted with approval from a North Dakota case on page 193, as follows:

> "'the incontestability clause is one, no doubt, used by the defendant as an inducement to those desiring to purchase insurance. It no doubt points out to them, by its agents, that by the terms of the policy after the expiration of the year there can be no defense of any kind or character interposed against the collection of the amount specified in the policy, in case the death of the insured should occur, and proceedings were had to collect the amount specified in the policy, except only for the non-payment of premium. The defendant ought not be permitted to lull the insured into a feeling of security by the use of the incontestability clause, and then endeavor to avoid its contract when death has forever sealed the lips of the insured, after

> having had the time specified by that clause to rescind the whole contract, which it wholly failed to do.***'" (Emphasis ours)

Plaintiff's agent lulled Defendant into the feeling of security that the loan would be paid for if her husband died. Now, her husband is dead and his lips are sealed.

(8) In Hulme v. Springfield Life Ins. Co., supra, and Baum v. Massachusetts Mutual Life Insurance Co., Okl., 357 P.2d 960 (1960) (cases involving certificates of insurance, under group policies, issued to persons who were supposed to be employees of the employer but which the insurers claimed were not employees), the Courts quoted from a Georgia case as follows:

> "'***In the present case the insured in his application represented himself to be the employee

> of the Standard Oil Company in a named capacity. After the lapse of the stipulated time and after the death of the insured, the company attempts to say that there never was a contract, because there was never a meeting of minds, for the representations made were untrue. We cannot agree to this position. It appears that the insured in good faith, *** made application to be insured as an employee ***. If the incontestable clause applies in cases of actual fraud, it applies all the more in a case of the present kind *** The incontestable clause estops the insurer from denying that the insured was an employee at the time of the issuance of the policy.***'" (Emphasis ours)

The Baum Court then said:

> "To our way of thinking, the line of reasoning advanced in the last above cited case is cogent and convincing and is particularly applicable to the facts presented by the instant case."

(9) In Baum v. Massachusetts Mutual Life

Insurance Co., supra, the Court quoted from an Arkansas case on page 963:

> "(I)t was stated that incontestable clauses '***It has been well said that such a provision is reasonable and proper because it gives the insured guaranty against expensive litigation to defeat his policy after the lapse of time specified, and at the same time gives the company a reasonable time and opportunity to ascertain whether the contract should remain in force.'"

The Court then said:

> "As pointed out in 45 C.J.S. Insurance §747, p. 758, an incontestable clause has been held to be in the nature of a statute of limitations."

This Court should issue the writ to resolve the conflicts between the Circuits, or, in the alternative, to certify the question to the Supreme Court of Oklahoma for decision of the Oklahoma law.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE DECISION BY THE TENTH CIRCUIT COURT OF APPEALS AND THE DECISIONS OF THIS COURT AND THE SUPREME COURT OF OKLAHOMA

The Trial Court entered no conclusion of law with respect to the issue of "laches" except to say "denied".

The Court of Appeals recognized that:

(1) 3 years passed between issuance of the Certificate and Defendant's husband's death;

(2) His death seriously hindered Defendant's ability to make the loan payments and to obtain additional credit life insurance;

but affirmed the Trial Court, denying laches.

Plaintiff admitted in response to Request for Admissions #21, that Aetna had the original or a copy of the Certificate of Insurance in its files

from September 21, 1977, to the date of the lawsuit (after date of death), and in #23 and #24 that neither Plaintiff nor Aetna notified Defendant or her husband that the Certificate was incorrect nor contested the amount of the Certificate prior to October 1, 1980 (date of death).

In Hanner v. Moulton, 138 U.S. 486, 34 L.Ed. 1032, 11 S.Ct. 408 (1891), this Court said at page 412:

> "An interval of nearly 13 years elapsed between the sale of the certificate and the filing of the bill in this suit. The value of the property has largely increased. Parties interested and witnesses have died, and the memory of those who survive has decayed. Not a person who is now interested in any of the land is implicated in the fraud charged in this bill. Under the facts above stated, the plaintiffs have been guilty of such laches that they cannot have any relief in a court of equity."

Oklahoma follows the same rule. In Syllabus No. 6 by the Court in Marshall v. Amos, 442 P.2d 500 (Okl., 1968), the

Court held:

> "***Laches in legal significance is not merely delay, but delay that works a disadvantage to another." (Emphasis ours)

In Swartz v. Dennis, 208 Okl. 334, 255 P.2d 923 (1952), the Court said on page 929:

> "In the trial court's finding of fact No. 26 and 27, the judge found that parties were dead and some of the correspondence had been destroyed making determination of the issues difficult but says that he has been able to ferret out all the essential facts and that these difficulties have not resulted in prejudice to the parties. The trial judge did display great patience and dilligence but we do not see how he could tell whether prejudice had resulted by the loss of papers and correspondence and absence of witnesses through death or how he could ferret out matters from these missing papers or from absent witnesses. Plaintiff and R.A. Lathrop could have brought this action before Joe Lathrop died, and the former parties had the papers after his death and before the correspondence was lost.

> We think the unability to prove pertinent facts due to plaintiffs waiting many years is as real detriment as shown in order to bring laches into operation.
>
> Laches has been sustained where only one and a half years intervened, *** and where two years elapsed***." (Emphasis ours)

The Court of Appeals said the Plaintiff did not know of the mistake until after Defendant's husband's death. However, in Washington v. Opie, 145 U.S. 214, 36 L.Ed. 680, 12 S.Ct. 822 (1892), this Court said at page 825:

> "(T)he plaintiff *** during the entire period from the close of the war until the institution of this suit, acted as if they did not intend, by legal proceedings, to question the validity of the settlements made with Castleman. And they so acted with full knowledge, or with ample opportunity to acquire knowledge, of all the material facts affecting their rights. By their long silence, and their unreasonable delay in commencing proceedings for relief, they have forfeited whatever right they had to invoke the aid of a court of

equity." (Emphasis ours)

In Graham v. Boston, H & E R. Co., 118 U.S. 161, 30 L.Ed. 196, 6 S.Ct. 1009 (1886), on page 1019, this Court said:

> "During all this time the records of the courts upon which appear all the proceedings by which the alleged fraud is claimed to have been consummated have been open to inspection and examination, and what has been done under them might have been known to the plaintiff, if he had seen fit to make inquiry." (Emphasis ours)

The bill was dismissed.

Oklahoma follows these rules. In Phelan v. Roberts, 77 P.2d 9, (Okl., 1938), the Court in Syllabus 3 by the Court, held:

> "As a general rule, laches cannot be imputed to one who has been justifiably ignorant of the facts creating his right or cause of action, and who therefore, has failed to assert it, and it is an essential element of laches that the party charged with it should have knowledge or the means of knowledge of the facts creating his right or cause of action."

(Emphasis ours)

This Court should issue the Writ to resolve the conflict of the Courts below with the decisions of this Court and the Supreme Court of Oklahoma.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Paul R. Hodgson
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Tulsa, Ok. 74119
(918) 592-2424

PROOF OF SERVICE

The undersigned hereby certifies that on the 14 day of April, 1986, three (3) true and correct copies of the above and foregoing instrument were mailed to:

Ms. Carol Seacat, Attorney at Law, P.O. Box 1174, Okmulgee, Ok. 74447;

and further certifies that the above and foregoing party is the only party required to be served herein.

Paul R. Hodgson

A P P E N D I X A

F I L E D
United States Court of Appeals
Tenth Circuit
Feb 18 1986

HOWARD K. PHILLIPS
CLERK

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

83-2527

ITT LIFE INSURANCE CORPORATION, a Wisconsin corporation,	)	
Plaintiff-Appellee	)	Appeal From The United States District Court For The Northern District of Oklahoma (D.C.No.81-C-513-C)
v.	)	
NAOMI FARLEY, an individual,	)	
Defendant-Appellant.	)	

Submitted on the briefs:

Elmore A. Page and Paul R. Hodgson, Inc., Tulsa, Oklahoma, for Defendant-Appellant.

Carol Seacat of Seacat & Seacat, Okmulgee, Oklahoma, for Plaintiff-Appellee.

Before HOLLOWAY, Chief Judge, SETH and McWILLIAMS, Circuit Judges.

SETH, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

Plaintiff-appellee, ITT Life Insurance Corporation, brought this diversity action against the appellant, Naomi Farley, seeking reformation to correct the stated amount of insurance on

a life insurance certificate issued to appellant's husband, Junior Farley. Appellant contended in response that reformation was barred by laches and the incontestability provisions of Oklahoma state statute and the policy itself. After trial to the district court, judgment was entered for the plaintiff reforming the Certificate of Insurance. The facts relevant to Mrs. Farley's appeal are as follows.

On September 21, 1977, Mr. and Mrs. Farley obtained a loan for $21,025.75 from Aetna Finance Company. The total amount repayable was $45,220.00 over ten years and the loan was secured by a mortgage on the Farley's home and a security interest in the Farleys' automobiles and household items. As part of this loan arrangement, Mr. Farley applied for a policy of single decreasing term credit life insurance in the amount

of $10,000. It was established that this was the maximum amount of insurance that Aetna Finance Company, ITT's agent, was permitted to write for a debtor at that time. The proper amount of premium payable for such a policy is $842.91. A form entitled "Insurance Requisition and Notice to Loan Applicant" stating $842.91 as the premium payable, the original amount of coverage as $10,000 and containing the initials "J.F." was entered into evidence. Also, a Federal Disclosure Statement dated September 21, 1977 and signed by both Mr. and Mrs. Farley revealed, along with the finance charges and total amount financed, that the original amount of the credit life insurance was $10,000.

Although the agent who initiated the policy on behalf of Aetna and ITT did not recall the events of September 21, 1977, Mrs. Farley testified that she arrived at

the insurance office after her husband had and that he remained after she left and that she did not read any of the forms which she signed. She also testified that the insurance agent stated to her: "Don't worry Naomi. There's insurance on it."

Also issued on September 21, 1977 to Mr. Farley was a Certificate of Insurance. However, the original amount of insurance stated on the Certificate was not the $10,000 which was stated on the other forms and corresponded to the premium actually paid by Mr. Farley. The Certificate instead stated the original amount of insurance as $45,220.00 which corresponded to the total amount repayable under Mr. Farley's loan. This discrepancy was not detected by either party for over three years and after the death of Mr. Farley on October 1, 1980. Pursuant to the insurance contract ITT

paid Aetna $6,974.92, the proper amount payable under a $10,000 decreasing term life insurance policy. The proceeds were credited to the Farley's loan leaving a balance due of $13,334.67.

In its Findings of Fact and Conclusions of Law the District Court specifically found that the intent of the parties was to form a contract for single decreasing term credit life insurance in the original amount of $10,000 and that the amount of $45,220.00 typed on the Certificate of Insurance was a mutual mistake of a clerical nature. The court found that the Farleys did not rely on the erroneously stated amount of insurance coverage, and found that the insurance agent did not represent to the Farleys that the loan was fully insured. Finally, the court concluded that where there is clear unequivocal evidence of a clerical error or scrivener's mistake

resulting in the inclusion of terms contrary to the clear intention of the parties, a court of equity will consider it a mutual mistake and will correct such errors.

Mrs. Farley appeals the district court judgment reforming the policy arguing that reformation such as that sought by ITT is barred in this instance both by application of the doctrine of laches and by operation of the incontestability provision of the policy. Inclusion of the incontestability provision is required by Okla. Stat. Am. tit. 36 § 4004, which states as follows:

> "There shall be a provision that the policy (exclusive of provisions relating to disability benefits or to additional benefits in the event of death by accident or accidental means) shall be incontestable, except for nonpayment of premiums, after it has been in force during the lifetime of the insured for a period of two years from its date of issue."

The effect of such a provision is further delineated in Okla. Stat. Ann. tit. 36 § 4015, which states:

> "A clause in any policy of life insurance providing that such policy shall be incontestable after a specified period shall preclude only a contest of the validity of the policy, and shall not preclude the assertion at any time of defenses based upon provisions in the policy which exclude or restrict coverage, whether or not such restrictions or exclusions are excepted in such clause; nor shall it be construed to preclude adjustment at any time of the amount payable or benefits accruing under the policy for misstatement of age, whether or not such age adjustment provision is excepted in such clause."

The policy in question fully complied with this statutory requirement with the inclusion of the following clause:

> "This policy shall be incontestable with respect to the life insurance hereunder, except for nonpayment of premiums, after it has been in force for two (2) years from its date of issue; and no statement made by any Debtor

> insured hereunder relating to his insurability shall be used in contesting the validity of the insurance with respect to which such statement was made after such insurance has been in force with respect to such Debtor prior to such contest for a period of two (2) years during the Debtor's lifetime nor unless such statement is contained in a written application signed by the Debtor."

Appellant contends that the doctrine of laches bars reformation of the Certificate of Insurance since three years passed between its issuance and Mr. Farley's death. Obviously, the death of Mr. Farley seriously hindered the ability of the appellant to make the loan payments and to obtain additional credit life insurance. However, appellant's proposed application of the doctrine of laches is inappropriate in these circumstances.

Appellant has asserted on appeal, contrary to the district court's findings

of fact, that the insurance agent represented to her that the loan would be fully covered by the insurance and that she relied on this representation to her detriment. Although the appellant does not specifically contend error in the findings of fact, these assertions are directly opposite to the factual findings of the trial court. In considering appellant's contentions on appeal we must apply Oklahoma law to the facts found by the trial court unless we conclude those findings of fact are clearly erroneous. Fed. R. Civ. P. 52(a). Volis v. Puritan Life Ins. Co., 548 F.2d 895, 901 (10th Cir.). Under this standard the district court's findings of fact will be disturbed only if our review of the record leaves us with a definite and firm conviction that a mistake has been made. Amoco Production Co. v. Western Slope Gas Co., 754 F.2d 303, 309 (10th Cir.);

Dowell v. United States, 553 F.2d 1233, 1235 (10th Cir.). Our review of the record does not indicate that such a mistake has been made and we must accept the district court's factual findings.

As mentioned, appellant contends that reformation of the Certificate of Insurance is barred by the incontestability provisions of the Oklahoma statute and the insurance policy itself. A review of those provisions indicates that they operate to preclude contests of insurance policy "validity" after the policy has been in force for two years. Therefore, again adopting the district court's factual findings, the discrete legal issue presented is whether the appellee's suit to reform an insurance certificate to reflect the actual mutual intent of the parties is a challenge to the policy's validity within the meaning of the incontestability

provisions of the policy and Oklahoma statute. If it is a challenge to the validity of the policy, it is barred. The trial court concluded that reformation is not barred in such an instance and we must agree.

There is no dispute as to the general availability of reformation as a remedy in instances where a term is erroneously included by reason of a scrivener's mistake. Such errors should be considered a mutual mistake and equity should correct such errors. Davenport v. Beck, 576 P.2d 1199, 1201 (Okl. App.). A party seeking reformation under Oklahoma law must show by proof that is clear, unequivocal, and decisive, and more than a mere preponderance, that a prior agreement existed and that the contract does not reflect that agreement because of fraud or mistake. Agee v. Travelers Indemnity Co., 264 F. Supp 322, 326 (W.D.

Okl.). See Evans v. Hartford Life Ins. Co., 704 F.2d 1177 (10th Cir.).

Although there are no Oklahoma cases interpreting the incontestability provisions in these circumstances, this court has previously addressed this specific issue. Columbian Nat. Life Ins. Co. v. Black, 35 F.2d 571 (10th Cir.). In that case, this court held "that an action to correct a purely clerical error in a policy issued, so that it will speak the truth as to the agreement of the parties, is not barred by the incontestable clause." 35 F.2d at 577. Although that case involved a Colorado insurance policy, its logic and result are persuasive in the interpretation of the Oklahoma incontestability provisions.

Appellant advances an argument based on a Ninth Circuit decision which equated an action to reform a policy with a contest of its validity. Richardson v.

Travelers Ins. Co., 171 F.2d 699 (9th Cir.). We cannot agree with the conclusion in Richardson that the purpose of the incontestability clause was to enforce terms in an agreement which neither of the parties sought or consented to. The mutual mistake which occurred in the present case is much different from the inception defenses of fraud, breach of condition, misrepresentation, and lack of insurable interest which are cited in Richardson. 171 F.2d at 701. In those instances, one party would have sought inclusion of the terms later subject to incontestability and a suit to reform those terms would constitute a challenge to the validity of the agreement actually reached. In the instant case, neither party agreed to the insurance amount which was erroneously included in the certificate and reformation here would effectuate the

intent of the parties. ITT does not contest the validity of the policy and indeed has already paid the coverage agreed to by the parties. Such a result is consistent with the purpose of the statutory incontestability provisions. Thus, the incontestability provisions allow a policyholder to be confident that dependents would be provided with what the policyholder had bargained for and expected to receive.

As we recognized in Columbian Nat. Life Ins. Co., it is possible that an actual contest could be prosecuted under the cloak of reformation. 35 F.2d at 577. However, we are confident that operation of the incontestability clause will not be avoided by semantics and artful pleading in those instances where its application was intended. Allowing reformation in this instance does not dilute the intended effect of the

incontestability clause.

The judgment of the trial court is AFFIRMED.

A P P E N D I X B

United States Court of Appeals
TENTH CIRCUIT
Office of the Clerk
C404 United States Courthouse
Denver, Colorado 80294

Howard K. Phillips
Clerk

Telephone
(303) 844-3157
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February 18, 1986

Mr. Paul R. Hodgson
Mr. Elmore A. Page
Paul R. Hodgson, Inc.
600 Southland Financial Center
4111 S. Darlington
Tulsa, OK 74135

Re: No. 83-2527; ITT Life Insurance Corporation v. Farley

Dear Counsel:

The Court has today entered an order, in the captioned appeal, on the docket as follows:

"2/18/86: Order: Appellant's motion to certify question of state law to the Supreme Court of the State of Oklahoma is denied -- Circuit Judges Holloway, Seth, and McWilliams. (parties served by mail)."

Sincerely yours,

/s/ Howard K. Phillips

HOWARD K. PHILLIPS, Clerk

HKP: kmh
cc: Ms. Carol Seacat, Seacat and Seacat,
317 West Seventh Street, P.O.
Box 1259, Okmulgee, OK 74447

L-9 10/84

APPENDIX C

FILED

Oct 27 1983

Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ITT LIFE INSURANCE CORPORATION, a Wisconsin corporation,	)	
Plaintiff	)	
vs.	)	No. 81-C-513-C
NAOMI FARLEY, an individual,	)	
Defendant.	)	

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law entered simultaneously herein, the Court finds for the plaintiff ITT Life Insurance Corporation and against the defendant Naomi Farley. The Certificate of Insurance issued by

plaintiff to Junior Farley is hereby reformed to correctly state the intent of the parties and to correct the clerical error in typing the amount of original insurance so that it will read $10,000.00 rather than $45,220.00.

The first and only remaining counterclaim of defendant Naomi Farley is hereby denied.

It is so Ordered this 27th day of October, 1983.

/s/ H. Dale Cook
H. DALE COOK
Chief Judge, U.S.
District Court

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

Oct 27 1983

Jack C. Silver, Clerk
U.S. DISTRICT COURT

ITT LIFE INSURANCE CORPORATION, a Wisconsin corporation,	)	
Plaintiff	)	
vs.	)	No. 81-C-513-C
NAOMI FARLEY, an individual,	)	
Defendant.	)	

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This is an action for reformation of a Certificate of Insurance. The claim of the plaintiff, ITT Life Insurance Company, is for the reformation of Certificate of Insurance No. 913 for

decreasing term credit life insurance, issued to Junior Farley, to correct the stated amount of original insurance to conform with the intent of the parties, and to state that the original amount of insurance is $10,000.00. The plaintiff's claim is based upon mutual mistake of the parties and/or mistake on the part of one party and fraud and inequitable conduct on the part of the other party.

The defendant, Naomi Farley, claims that there was no mutual mistake and/or mistake on the part of one party and fraud and inequitable conduct on the part of the other party. Defendant further claims that if there was a mistake, it was unilateral on the part of plaintiff and cannot be reformed under Oklahoma law; that construction of the policy prohibits reformation; that incontestability provisions of state statute and the incontestability clause

and clerical error clause of the policy prohibit reformation; and that reformation is bared by laches.

This case was tried to the Court in a non-jury trial held on March 14, 1983. The parties were allowed additional time to brief their positions. The parties have filed these briefs and replies, as well as trial briefs and proposed findings.

After considering the pleadings, the testimony and exhibits admitted at trial, the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff, ITT Life Insurance Corporation, is incorporated under the laws of the State of Wisconsin with its principal place of business in Minnesota.

2. Defendant, Naomi Farley, is a citizen and resident of the State of Oklahoma.

3. The matter in controversy exceeds, exclusive of interests and costs, the sum of $10,000.00.

4. On September 21, 1977, Junior and Naomi Farley obtained a loan from Aetna Finance Company for $21,025.75. The loan was secured by a first real estate mortgage on the Farleys' home, and by security agreement on the Farleys' automobiles and household goods. The term of loan was ten years, and the total amount repayable, including interest, was $45,220.00.

5. On the same day, in connection with the loan, Junior Farley applied for a policy of single decreasing term credit life insurance in the original amount of $10,000.00. A form entitled "Insurance Requisition and Notice to Loan

Applicant", which stated that the original amount of coverage is $10,000.00, and that the premium was $842.91, contains the initials J.F. This amount of insurance stated on the requisition form ($10,000.00) was the maximum amount of insurance that Aetna Finance Company was allowed to write on any one debtor on September 21, 1977. The proper premium for this policy was $842.91.

6. The Federal Disclosure Statement, signed by both Junior and Naomi Farley on September 21, 1977, showed the finance charges, the amount financed, the total amount of payments, and indicated that the amount of life insurance coverage was $10,000.00.

7. On September 21, 1977, in return for the premium paid by Junior Farley, Aetna Finance Company issued and delivered a certificate of insurance,

Certificate No. 913 under the group policy with plaintiff, to Junior Farley, stating that the original amount of insurance is $45,220.00. This amount was inserted by reason of a clerical error and should have read $10,000.00. This error was not discovered by either party until after the death of Junior Farley on October 1, 1980.

8. On September 21, 1977, Naomi Farley came to Aetna Finance Company to sign the loan documents. Junior Farley was there when Naomi Farley arrived and remained after she left. Mr. Hanson, agent of Aetna on September 21, 1977, told Naomi where to sign the documents and she signed them without reading them. Naomi states that Hansen told her: "Don't worry Naomi. There's insurance on it." This statement does not amount to a representation that the full amount of the loan, including interest, was covered

by insurance.

9. The intent of the parties, Aetna Finance Company and Junior and Naomi Farley, was to form an insurance contract for single decreasing term credit life insurance in the original amount of $10,000.00. The clerical mistake in the amount of insurance typed on Certificate No. 913 was a mutual mistake.

10. On October 1, 1980, the plaintiff paid $6,974.92 to Aetna Finance Company as proceeds of Junior Farley's insurance contract, which was credited to the Farleys' loan. This amount was the proper amount payable on October 1, 1980, on a single decreasing term life insurance policy in an original amount of $10,000.00.

11. The balance due on the Farleys' loan, immediately following payment by plaintiff, was $13,334.67. The balance due on the Farleys' loan as of March 14,

1983, is $19,972.12.

12. There was no reliance by Junior and Naomi Farley on the certificate which stated erroneously that the original amount of coverage was $45,220.00. The agent, Hansen, did not represent nor did Junior or Naomi Farley rely on his representation that the loan was fully insured.

CONCLUSIONS OF LAW

1. This Court has jurisdiction and venue of the subject matter pursuant to 28 U.S.C. Sections 1332 and 1391.

2. "Where, by reason of a scrivener's mistake, an instrument 'omits or contains terms or stipulations contrary to the common intention of the parties...' a court of equity will consider it a mutual mistake common to both parties -- that is, the scrivener left out or included provisions neither

party intended -- and therefore correct the error in a manner that will place the parties in the position they would have occupied had the error not occurred." Davenport v. Beck, 576 P.2d 1199, 1201 (Okl. App. 1977).

3. The insurance contract herein contains a scrivener's error, that is, an unintentional drafting mistake, and equity will correct such errors. Id., 1203; State ex.rel. Comm'rs of Land Office v. Phillips Petr. Co., 258 P.2d 1193 (Okl. 1953); Warner v. Continental Casualty Co., 534 P.2d 695 (Okl. App. 1975).

4. Evidence to sustain a judgment reforming a written contract must be clear, unequivocal, and decisive. Nelson v. Daugherty, 357 P.2d 425 (Okl. 1960).

5. The plaintiff, ITT Life Insurance Company, is entitled to have the Certificate of Insurance issued to

Junior Farley reformed to correctly state the intent of the parties and to correct the clerical error in typing the amount of original insurance so that it will read $10,000.00 rather than $45,220.00.

6. The first and only remaining counterclaim of defendant Naomi Farley is hereby denied.

It is so Ordered this 27th day of October, 1983.

/s/ H. Dale Cook
H. DALE COOK
Chief Judge, U.S.
District Court